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Michael Isenberg, Director
Telecommunications Division
Commonwealth of Massachusetts
Department of Telecommunications and Energy
One South Station, Floor 2
Boston, MA 02110

Dear Mr. Isenberg:

On March 8, 2005, the Department issued several questions relating to Verizon Massachusetts' ("Verizon MA") January 4, 2005, letter concerning the provision of Section 271 services under the Telecommunications Act of 1996 (the "Act"). In that letter, Verizon MA expressed its intent to make Section 271 services available to carriers pursuant to individually-negotiated contracts, rather than tariff offerings.

The following responses to the Department's questions demonstrate that Verizon MA's provisioning of Section 271 requirements under commercial contract arrangements complies fully with the Federal Communications Commission's ("FCC") *Triennial Review Order* and the D.C. Circuit's *USTA II* decision.¹ As recognized by the Department,² Section 271 requirements are subject to FCC jurisdiction and enforcement. Moreover, the FCC declared that Section 271 arrangements are governed by the pricing and non-discrimination standards set forth in Section 201 and 202 of the Communications Act of 1934. *Triennial Review Order* ¶ 656; *USTA II*, 359 F.3d at 588-90. Accordingly,

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (Aug. 21, 2003) ("*Triennial Review Order*" or "*TRO*"), vacated in part and remanded, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. Mar. 2, 2004) ("*USTA II*"), cert. denied, *NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

² The Department concluded in D.T.E. 03-59 that the "just and reasonable" standard set forth in Sections 201 and 202 of the Communications Act is applicable to Section 271 elements, and that market-driven rates would be considered in determining a just and reasonable rate. D.T.E. 03-59, *Order Closing Investigation*, at 19 (November 24, 2003).

federal law preempts the Department from imposing tariff filing requirements on Section 271 services pursuant to state regulations.

BACKGROUND

Section 271 obligates Verizon MA to provide access to “loop[s],” “transport,” “switching,” and “databases and associated signaling,” independent of any obligation to provide unbundled network elements (“UNEs”) under Section 251(c)(3), 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x); *see Triennial Review Order* at ¶¶ 653-59. However, nothing in the Act gives a state commission any power to interpret or enforce Section 271 requirements; only the FCC may issue regulations on these matters.

As the FCC has held, Congress granted “*sole authority* to the [FCC] to administer . . . section 271” and intended that the FCC exercise “*exclusive authority* . . . over the section 271 process.” *InterLATA Boundary Order*³ at ¶¶ 17-18 (emphases added). Courts have likewise held that “Congress has clearly charged the FCC, and *not the State commissions*,” with assessing BOC’s compliance with section 271. *See, e.g., SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added). And the text of Section 271 is replete with references to the FCC’s duties. *See* 47 U.S.C. § 271(d)(3), (4), (6).

By contrast, the only role Congress identified for state commissions in Section 271 is with respect to an “application” for long-distance approval. Specifically, Congress provided that “the [FCC] *shall* consult with the State commission of [that] State” so that the FCC (not the state commission) can “verify the compliance of the Bell operating company with the requirements of [section 271](c).” *Id.* at § 271(d)(2)(B) (emphasis added). Congress also gave state commissions no role *after* approval of such an application,⁴ and the FCC has never held that it has the obligation to consult with a state commission before ruling on a complaint under Section 271(d)(6). State commissions, therefore, have no authority to “parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order” — whether under federal law or “ostensibly under state law” — “dictating conditions on the provision” of 271 elements. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004). Such efforts are preempted because they “bump[] up

³ Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, at ¶ 17 (1999) (“*InterLATA Boundary Order*”).

⁴ This is reiterated in the *Triennial Review Order*, in which the FCC stated that “[i]n the event that a BOC has already received Section 271 authorization, Section 271(d)(6) grants the Commission [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271.” *Triennial Review Order*, ¶ 665.

against” the procedures that are “spelled out in some detail in sections 251 and 252” and “interfere[] with the method the Act sets out” in Section 271. *Id.*

The detailed procedures in Sections 251 and 252, moreover, confirm that state commissions have *no* authority to regulate - or tariff - Section 271 services. To the extent those sections impose obligations on incumbents or grant authority to state commissions, they are expressly tied to network elements that must be provided as UNEs under Section 251. Thus, state commission authority over interconnection agreements is triggered by “a request . . . pursuant to section 251” and where “negotiation[s] *under this section*” are unsuccessful either party “may petition a State commission to arbitrate any open issues.” 47 U.S.C. § 252(a)(1), (b)(1) (emphases added); *see also id.* § 252(c)(1) (state commission must resolve open issues consistent with “the requirements of section 251”); *id.* § 252(e)(2)(B) (state commission may reject arbitrated agreement that “does not meet the requirements of section 251”).

Likewise, Section 251(c)(1) obligates incumbents to negotiate — and, if necessary, arbitrate pursuant to Section 252 — only “terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of []section [251](b) and [(c)].” *Id.* § 251(c)(1). Based on these provisions, the FCC has held an agreement that does *not* “contain an ongoing obligation relating to section 251(b) or (c)” — such as an agreement limited to Section 271 elements — is *not* “an interconnection agreement that must be filed pursuant to section 252(a)(1)” and is *not* subject to “state commission . . . approv[al] or reject[ion] [of] the agreement as an interconnection agreement under section 252(e).” *Qwest Declaratory Ruling*⁵ at ¶ 8 & n.26 (emphases added).

With respect to state commissions’ authority to set rates, Section 252(d)(1) is similarly “quite specific” and “*only* applies for the purposes of implementation of section 251(c)(3).” *Triennial Review Order* ¶ 657 (emphasis added). The FCC’s conclusion was compelled by the text of Section 252, which authorizes state commissions, in arbitrating interconnection agreements, to establish rates only “for network elements according to []section [252](d),” which in turn authorizes “[d]eterminations by a State commission” of the “rate for network elements *for purposes of []section [251](c)(3).*” 47 U.S.C. § 252(c)(2), (d)(1) (emphasis added). Congress made no comparable delegation of rate-setting authority to state commissions with respect to 271 requirements, and there is “*no serious argument*” that the UNE pricing regime “appl[ies] to unbundling pursuant to § 271.” *USTA II*, 359 F.3d at 589 (emphasis added). And because Congress gave the FCC — and the FCC alone — authority to determine whether a BOC complies with

⁵ *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-8917, 17 FCC Rcd 19337, at ¶¶ 8, 12 & n.26 (2002) (“*Qwest Declaratory Ruling*”).

Section 271, that authority rests exclusively with the FCC. *See USTA II*, 359 F.3d at 565. Indeed, the Department has already recognized this basic point.⁶

In short, there cannot be any question that under the 1996 Act, FCC and court rulings, and Department decisions, Section 271 of the Act does *not* require Verizon MA to continue to provide delisted UNEs at TELRIC rates and that the FCC has exclusive jurisdiction to determine and enforce Verizon MA's Section 271 obligations.

DTE Question 1:

Please provide citations to FCC or court decisions to support your statement that the FCC has concluded that Section 271 elements should be provided pursuant to negotiated agreements. Also, please indicate whether the FCC has held that a negotiated agreement is the exclusive means by which Verizon can provision these services to carriers. Also, please indicate whether the FCC has held that states may not require Section 271 elements to be tariffed pursuant to state common carriage tariffing statutes.

Verizon MA's Response to DTE Question 1:

In exercising its authority to implement Section 271, the FCC has expressed a clear preference for commercially negotiated agreements with respect to those elements. In its *Triennial Review Order*, the FCC stated that "a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into *arms-length agreements* with other, similarly situated purchasing carriers to provide the element at that rate."⁷ *Triennial Review Order* ¶ 664 (emphasis added). The FCC has also stated that "[t]he Communications Act emphasize the role of commercial negotiations as a tool in shaping a competitive communications marketplace." *See* Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on *Triennial Review Next*

⁶ The Department first considered this issue in D.T.E. 98-57 Phase III, where it rejected CLEC claims to exercise authority over Verizon MA's provision of packet switching under Section 271. The Department ruled that "the FCC, not the Department, has authority to enforce that obligation under Section 271. 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. *Id.*" D.T.E. 98-57, *Phase III-D Order*, at 16 (January 30, 2004). Likewise, in D.T.E. 03-59, the Department held that it "does not have jurisdiction to enforce unbundling obligations under Section 271 of the Telecommunications Act of 1996." *D.T.E. 03-59-A Order*, at 1-2 (January 23, 2004), affirming *D.T.E. 03-59 Order Closing Investigation*, at 19 (November 24, 2003).

⁷ *See also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3905, at ¶ 473 (1999) ("*UNE Remand Order*"), *vacated and remanded*, *United States Telecomm. Ass'n v. FCC*, 290 F. 3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

Steps (Mar. 31, 2004); *see also*, *UNE Remand Order* ¶¶ 470, 473 (when services must be provided under Section 271 “the market price should prevail, as opposed to a regulated rate”).

State regulation of Section 271 requirements (even if it were permitted, which it is not) would contradict the FCC policy. The possibility of state commission review and potential modification of voluntary commercial agreements – which follows inexorably from any tariffing process – would fundamentally strip the parties of the benefit of their bargain by making any deal subject to modification and litigation, thus diminishing their ability to resolve issues with any certainty at the bargaining table. The FCC recognized this in the *Qwest Declaratory Ruling*, explaining that subjecting commercial agreements to the same procedural requirements that Congress specifically applied only to agreements implementing Section 251(b) and (c) would raise “unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs.”⁸ *Qwest Declaratory Ruling* ¶ 8. As the FCC observed, there has been “no adverse effect” on competition – let alone any “perverse policy impact” – from BOCs’ provision of these Section 271 elements without state regulation. *Triennial Review Order* ¶ 661.

In addition, two U.S. Court of Appeals’ decisions have found that the 1996 Act limits state commission authority to impose tariff filing requirements in the Section 251 context. *Wisconsin Bell, Inc. v. Bie, Inc. et al*, 340 F.3d 441, 444 (7th Cir. 2003); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002). These courts found that a tariff requirement is preempted because it would interfere with the procedures established by the Act by “plac[ing] a thumb on the negotiating scales,” which “[a]t the very least, ... complicates the contractual route by authorizing a parallel proceeding.” *Wisconsin Bell*, 340 F.3d at 444; *Verizon North, Inc. v. Strand*, 309 F.3d at 941. The *Wisconsin Bell* court added that “[t]he tariff procedure short-circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement. 47 U.S.C. § 253(b)(1).” 340 F.3d at 445. If allowed, this would undermine the “negotiation procedure established by the federal act [which] provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure.” *Id.*

⁸ In addition, most competitors operate in multiple states and typically seek to negotiate multi-state agreements with the incumbents. If the rates, terms and conditions for provision of Section 271 elements in such agreements were subject to diverging and potentially conflicting regulation by each state commission, the ability of carriers to reach commercial agreements would also be severely undermined. In this regard, it is noteworthy that numerous competitors in multiple states have obtained access to directory assistance and operator services as Section 271 elements from Verizon under a standard multi-state contract offer, without any regulation by state commissions.

These decisions apply with all the more force when the agreement concerns Section 271 requirements. Unlike the Section 251 regime – which contemplates a detailed state role in the ultimate interconnection agreement – the FCC has concluded that there is no state role in Section 271 agreements: carriers are to negotiate commercial agreements, the terms are governed by federal law standards, and enforcement rests with the FCC.⁹ Nothing in Section 271 requires Verizon MA to include Section 271 services in interconnection agreements filed with the Department under Section 252(a)(1) or authorizes the Department to regulate commercial agreements via any means, such as a tariff requirement, regarding Verizon MA's provision of Section 271 elements.

DTE Question 2:

Please state whether Section 271 requires Verizon to provide network elements in a non-discriminatory manner to all carriers interested in purchasing the elements or permits Verizon to offer such network elements only to those requesting carriers with which Verizon chooses to deal in accordance with such contracts as Verizon makes with them. If Verizon is obligated under Section 271 to provide network elements in a non-discriminatory manner to all carriers, please explain whether Verizon meets the definition of a common carrier with respect to those elements.

Verizon MA's Response to DTE Question 2:

Section 271 services are governed by the pricing and general non-discrimination standards under Sections 201 and 202 of the Communications Act. *USTA II*, 359 F.3d at 590. Those standards are administered by the FCC – not state commissions.

Section 201 requires that “[a]ll charges, practices, classifications, and regulations” for communications services offered by common carriers “shall be just and reasonable.” 47 U.S.C. § 201(b). Section 202 declares as unlawful any “unjust or unreasonable discrimination” in providing those services. 47 U.S.C. § 201(b).

Although these sections require that services be provided in a manner that is not unreasonably discriminatory, the FCC has, as noted above, determined that a BOC

⁹ Indeed, the Department has previously recognized in the telecommunications context that where preemptive federal law ousts it of jurisdiction over services of a common carrier, a state tariff requirement cannot stand. *See* Investigation by the Department of Public Utilities upon its own motion on Regulation of Commercial Mobile Radio Services, D.P.U. 94-73, *Order* at 14 (1994) (eliminating tariffs for radio common carriers under state law where state jurisdiction preempted by federal law).

satisfies that federal law standard when it offers Section 271 arrangements at market rates, terms, and conditions, such as where it has entered into “arms-length agreements” with its competitors. In its *Triennial Review Order*, the FCC stated that

[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into *arms-length agreements* with other, similarly situated purchasing carriers to provide the element at that rate.

Triennial Review Order ¶ 664 (emphasis added). Thus, the classification of the Section 271 requirements is not relevant to the issue that underlies the Department's question because the FCC expressly contemplates commercial agreements between carriers for Section 271 requirements and the Act and FCC rulings make such agreements subject to the FCC's exclusive jurisdiction.

DTE Question 3:

Please provide an overview of the process that Verizon will employ in reaching “individually-negotiated contracts based on the particular circumstances, needs and requirements of the carrier customers.” In addition, please address the following:

- a. Will Verizon engage in carrier-to-carrier marketing or other communications to potential carrier customers? If so, please describe the nature and content of such marketing.
- b. Notwithstanding Verizon's statement that it will reach individually-negotiated agreements based on requesting carriers' particular needs and circumstances, please identify classes of carriers, if

any, who, based on their particular needs and circumstances, are similarly situated and would be offered similar rates, terms, and conditions for any Section 271 element?

- c. Does Verizon intend to establish any mandatory rates, terms, or conditions for any Section 271 network element that must be included in its final negotiated agreements? Are all rates, terms, and conditions for Section 271 network elements subject to negotiation?

Verizon MA's Response to DTE Question 3:

a. Verizon MA has informed CLECs through various means, such as industry notices, that it is willing to negotiate commercial agreements for Section 271 requirements. Verizon responds to CLEC expressions of interest in Section 271 services on a case-by-case basis.

b. Verizon has not identified "classes of carriers" for the purpose of negotiating Section 271 commercial agreements, but is willing to negotiate agreements based on the particular needs of individual CLECs.

c. See Verizon MA's Response to DTE Question 3(b) above. The terms and conditions of all Section 271 arrangements are subject to negotiation.

DTE Question 4:

Please explain how Verizon's stated offering of Section 271 elements solely through "individually-negotiated contracts based on the particular circumstances, needs and requirements of the carrier customers" meets Verizon's obligations, if any, under Section 271.

Verizon MA's Response to DTE Question 4:

See Verizon MA's Responses to DTE Questions 1 and 2 above.

Sincerely,

/s/Barbara Anne Sousa

Barbara Anne Sousa

cc: Service Lists D.T.E. 03-60, 04-73, 03-59